

NOT FOR PUBLICATION

**IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN**

| | | |
|---|---|----------------|
| DOMINO OIL, INC., |) | |
| |) | |
| Plaintiff, |) | Case No. 96-99 |
| |) | |
| v. |) | |
| |) | |
| PHOENIX ASSURANCE CO. OF NEW YORK, |) | |
| |) | |
| Defendant. |) | |
| |) | |

APPEARANCES :

Ronald Belfon

St. Thomas

For the plaintiff,

Stephen Brusch

St. Thomas

For the defendant.

MEMORANDUM

Moore, C.J.

Pending before the Court is defendant's motion to dismiss the second amended complaint and plaintiff's cross-motion for summary judgment. A hearing was held March 20, 1998.

INTRODUCTION

This case arises out of the aftermath of Hurricane Marilyn. Domino Oil ["Domino"] operates several gas stations in the Virgin Islands, several of which were damaged during the hurricane. Domino maintained an insurance policy through Phoenix Assurance Company of New York ["Phoenix"]. Following the damage, Domino

submitted a claim in excess of \$1 million dollars. Included in that claim was \$110,000 for fuel re-processing in Puerto Rico and \$40,000 for transportation of the fuel. The fuel, it turns out, was evidently not damaged and was sold to consumers with no re-processing.

Much fact intensive squabbling has ensued. Phoenix has denied the claim in full based on the alleged fraud in submitting the re-processing claim. Domino has filed suit alleging breach of the implied covenant of good faith and fair dealing and requests punitive damages. Phoenix has in turn cross-claimed for its \$150,000 advance. Phoenix filed a motion to dismiss the bad faith claim, to which Domino responded and filed a cross-motion for summary judgment. It is this cross-motion for summary judgment which will be dealt with first.

ANALYSIS

CROSS-MOTION FOR SUMMARY JUDGMENT

Domino cross claims for summary judgment alleging that Phoenix cannot pursue its claim for the return of the \$150,000 advance because it has allegedly failed to conform to Virgin Islands law. Such motion will be denied. Domino relies on the fact that a certificate of authority is required to act as an

insurer in the Virgin Islands and that fees and bonds are required by the Lt. Governor's office. A lack of these filings subjects an insurer operating illegally to fines, imprisonment, penalties, forfeitures, the voidability of contracts by the insured. Further, failure to pay franchise taxes bars an insurer from commencing any action.

Phoenix contends that it is not subject to regulatory and tax jurisdiction in the Virgin Islands because the only connection to the Virgin Islands is the location of the risk. The affidavit supplied by Phoenix states that solicitation took place in Puerto Rico and New York. The negotiations took place in New York. The policy was delivered to the insurance broker in New York. Premiums were paid in New York. The \$150,000 advance was paid in New York and deposited in Puerto Rico. The insured properties were not only in the U.S. Virgin Islands, but also in Puerto Rico and the British Virgin Islands. Such activities which occurred outside the U.S. Virgin Islands are not within the statutory definition of "insurance transaction" in the Virgin Islands. Virgin Islands Code Ann., Title 22, § 5(1993).

The only connection that Phoenix has with the Virgin Islands is that the claim was being investigated and defended here and a portion of the insured properties were located here. The former is expressly excluded from the definition of insurance

transaction. See 22 V.I.C. §5 (4). The latter is not a proper nexus for assertion of taxation or regulation under even the most restrictive reading of due process. See *State Board of Ins. V. Todd Shipyard's Corp.*, 370 U.S. 451 (1962).

Accordingly, the Court holds that Phoenix did not "act as an insurer" nor "transact insurance in this territory." 22 V.I.C. § 202(a). The cross-motion for summary judgment will be denied.

MOTION TO DISMISS

Based on the same facts recited above in denying summary judgment to plaintiff, this Court finds that New York law is the appropriate law to apply in this matter. See *Armotek Industries, Inc. v. Employers Insurance of Wausau*, 952 F.2d 756, 760 (3d Cir. 1991) (citing RESTATEMENT (SECOND) OF CONFLICTS § 188(2)).

In New York, a cause of action against an insurance company for bad faith cannot be maintained where the plaintiff fails to meet the standard of "pleading and proof of 'fraud,' 'a high degree of moral turpitude,' 'wanton dishonesty' and 'criminal indifference to civil obligation,' which is 'aimed at the public generally.'" *Rocanova v. Equitable Life Assurance*, 612 N.Y.S.2d 339, 342 (N.Y. 1994) (as paraphrased by *Great American Insurance Co. v. J. Aron & Co.*, 1995 A.M.C. 2854, 1995 WL 325652 (S.D.N.Y., May 30, 1995)).

The Court agrees with Phoenix that Domino failed sufficiently to plead fraud, a high degree of moral turpitude, wanton dishonesty and criminal indifference to civil obligation which is aimed at the public generally. Based on the facts as alleged by Domino, the Court concludes that Phoenix is merely defending itself against what, with considerable justification, it views as an inflated claim. Plaintiff's second amended complaint therefore fails to meet the requirements of Rule 9(b) of the Federal Rules of Civil Procedure and will be dismissed without prejudice.

CONCLUSION

An appropriate Order is attached.

ENTERED this 16th day of April, 1998.

For the Court

**/s/
Thomas K. Moore
Chief Judge**

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| Defendant. |) | |
| _____ |) | |

ORDER

For the reasons stated in the foregoing Memorandum, it is hereby

ORDERED that plaintiff's cross-motion for summary judgment is **DENIED**; and further

ORDERED that defendant's motion to dismiss the claim for bad faith is **GRANTED** and the second amended complaint is **DISMISSED WITHOUT PREJUDICE**, each party to bear its own costs and attorney's fees.

ENTERED this 16th day of April, 1998.

For the Court

_____/s/_____
Thomas K. Moore
Chief Judge

ATTEST:
ORINN ARNOLD
Clerk of the Court

By:_____/s/_____
Deputy Clerk

cc: Hon. G.W. Barnard
Mrs. Jackson
Adam Farlow
Ronald Belfon
Stephen Brusch